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No. 253

In the

Supreme Court of the United States

OCTOBER TERM, 1957

RONALD MILLER, *et al.*,

Petitioners,

v.

ROBERT W. JENNINGS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR ALL RESPONDENTS EXCEPT THE UNITED STATES OF AMERICA, ROBERT W. JENNINGS AND W. F. RESCH

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OPINIONS BELOW

There was no opinion written by the District Court. The opinion of the Court of Appeals for the Fifth Circuit, and the dissenting opinion (App. 17, Petition), are reported at 243 F. 2d 157.

JURISDICTION

Petitioners' statement of jurisdiction, Petition 2 and 6, is considered adequate.

QUESTION PRESENTED

Whether the District Court erred in dismissing Plaintiffs' First Amended Complaint.

This overall question includes three others, an affirmative answer to any one of which requires an affirmative answer to the primary question itself:

I.

Whether the United States has consented to be sued in the kind of action set forth in Plaintiffs' First Amended Complaint (R. 54-57).

II.

Whether Plaintiffs' First Amended Complaint states a claim against Respondents upon which relief can be granted.

III.

Whether it appears from the face of Plaintiffs' First Amended Complaint and from facts within the judicial notice of the Court that the Elephant Butte Irrigation District of New Mexico and/or its constituent land owners in New Mexico, being the owners of water rights appurtenant to lands in New Mexico, under the Reclamation Laws of

the United States, who have not been served with any process to require their appearance herein, who have not appeared herein, and who reside beyond the jurisdiction of the trial court, are indispensable parties to this litigation.

STATEMENT OF THE CASE

Petitioners' Statement of the Case, Petition 4, is sufficiently inaccurate in some respects to require correction.

The Rio Grande Federal Reclamation Project is not owned by the United States Government. It is owned by the individual farmers whose lands comprise the New Mexico unit of the Project, known as the Elephant Butte Irrigation District, and by the individual farmers whose lands make up the Texas unit of the Project, known as the El Paso County Water Improvement District No. 1, the latter being one of the Respondents herein.

It is the facilities necessary for the storage and transportation of water to the land which are owned and operated by the United States.

When it is said, page 4, Petition, that "The Project serves an area extending from Elephant Butte Dam nearly to Fort Quitman, Texas, about 85 miles downstream from El Paso. Substantially all the irrigable lands within this area lie within the confines of three irrigation districts. The farthest upstream is Elephant Butte Irrigation Dis-

* Last clause, section 6, Reclamation Act of June 17, 1902, 32 Stat. 388, 389: "*Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress." Section 6 is set out in full in App. B.

trict of New Mexico, lying wholly in New Mexico; the farthest downstream of the district is the Hudspeth County Conservation and Reclamation District No. 1, within Hudspeth County, Texas; between these is the El Paso County Water Improvement District No. 1, within El Paso County, Texas," one not familiar with the situation would be led to believe that the Hudspeth County Conservation and Reclamation District No. 1 is a part of the Rio Grande Federal Reclamation Project, but this is not correct. The Hudspeth District is not now and never was a part of the Project.[1]

Again, on page 5 of the Petition, the statement is made that "Beginning in 1951, as a 'conservation' measure the Reclamation officials *cut off the flow of water* to the landowners of Hudspeth District * * *." This is misleading in that it was nature and not the Reclamation officials that caused the scarcity of water. Under normal conditions the average delivery of water to first class Project water right lands is about 3 acre *feet* per acre per year. On account of the drought the allotment was cut until in 1955 there was delivered to Project lands *5 inches* per acre for the year; in 1956, 4.7 *inches* for the year, and for the present year of 1957 the allotment has been set for a fraction over 6 *inches*. There simply has not been enough water with which to supply even Project lands, and the idea that

[1] Hudspeth County Conservation & Reclamation District No. 1, et al., v. Robbins, *et al.*, 214 F. 2d 425, 431, note 6; First Amended Complaint, paragraph 2 (R. 58, shows the Project ends at the El Paso-Hudspeth County Line, and in paragraph VI, R. 68, shows the Hudspeth County District to be a Warren Act contractor which it would not be if it were part of the Project.

there was any surplus to "flow" to Warren Act contractors such as Petitioner is wholly fantastic.

The nature of the suit now presented for consideration of this Court is best shown by the First Amended Complaint, R. 54-77. We submit that it is not one "for the adjudication of rights to the use of water of a river system."

ARGUMENT

I.

The Decision Below Is Clearly Correct.

(1) The trial court was without jurisdiction in this case for at least two reasons:

(a) The United States may not be sued without its consent. The question here is whether that consent has been given by the Act of July 10, 1952, enacted as a part of the *Department of Justice Appropriation Act, 1953, C. 651, Title II, Sec. 208, 66 Stat. 560, 43 U. S. C., Sec. 666,* which is the only method by which Petitioners claim that the United States has waived its sovereign immunity in this action.

For the Congress to waive sovereign immunity in one kind of a case does not authorize suit against the Government in some other kind of a case. A plaintiff must bring himself within the express terms of an Act of Congress waiving immunity in specific cases. *McMahon v. United States, 342 U. S. 25, 27, 96 L. Ed. 26, 30.*

Appendix A.

The Act of July 10, 1952, on which reliance is placed by Petitioners, gives consent for the joinder of the United States *only* in the event that such suit is brought for either one of two purposes:

> (1) "for the *adjudication of rights* to the *use of water of a river system or other source*, or
>
> (2) "for the *administration of such rights*, where it appears that the United States is the *owner* of, or is in the process of acquiring, water rights by appropriation under state law, * * * and the United States is a necessary party to such suit." (Emphasis ours.)

A casual reading of the Complaint (R. 54-57), shows that it is not a suit for the administration of water rights, and a more deliberate consideration of it in detail shows that it is not a suit for the adjudication of rights to the use of the waters of the Rio Grande river system, either, but is an effort to determine eight other questions:

1. Whether rights to use Rio Grande water in Texas may be acquired only in conformity with state law. (Complaint III, 3.6 and 3.7, R. 61-62.)

2. Whether rights to use of certain drainage water have been appropriated. (Complaint IV, 4.11, R. 65.)

3. Whether water rights are affected by methods of financing. (Complaint V, 5.7, R. 67.)

4. Whether under the Warren Act the Secretary of the Interior may contract only for the physical impounding, storage and carriage of water. (Complaint VI, 6.4, R. 69.)

5. Whether the United States, under the Reclamation Laws and Warren Act, owns any water rights; or the rights of Hudspeth County farmers can be re-

stricted by Warren Act contracts; or the Hudspeth District may subordinate the rights of its constituents to those of anybody else. (Complaint VII, 7.6, 7.7 and 7.8, R. 71-73.)

6. Whether in normal years the Rio Grande has a perceptible and calculable normal flow to which riparian rights attach. (Complaint VIII, 8.5, R. 74.)

7. Whether use of water by the United States for operation of a hydro-electric plant at Elephant Butte is an unlawful invasion of water rights of all down stream farmers. (Complaint IX, 9.9, R. 76.)

8. Whether the defendant Reclamation officials should be enjoined from diverting water "to or for the named defendants, and to or for the other members of the class which the named defendants represent, in such a way as to interfere with the rights of the plaintiffs as herein alleged." (Complaint X, 10.3, R. 77.)

The settlement of those questions would in no way determine the amount of water which any plaintiff or any defendant would be entitled to receive; nor would it determine the proportion of the total water in any stretch of the Rio Grande at any stated time which any plaintiff or any defendant would be entitled to receive; nor would it make any kind of allotment on an acre basis to anybody, either plaintiff or defendant.

Neither would it determine priorities between any plaintiff and any defendant; nor between Hudspeth County users and El Paso County users; nor between Texas users and New Mexico users, all of which priorities, whatever they are, do exist, and must be established in any adjudi-

cation of water rights if the action is "for the adjudication of rights to the use of water of a river system."

Nowhere in the Complaint is it set forth *what* claimed water rights any plaintiff seeks to establish against any defendant, but when taken as a whole shows on its face that it is merely an effort to secure an advisory opinion on generalities and attempts a class action involving drainage water from artificial canals which are a part of a Federal Reclamation Project. The action simply is not one for adjudication of rights to the use of water of a river system within the meaning of the Act of July 10, 1952, and has been pyramided into something far beyond the limits of, and never contemplated by, that Act. It would be as logical to claim that the United States had waived its sovereign immunity in this case by the passage by Congress of the Tucker Act or the Federal Tort Claims Act.

A suit for the adjudication of water rights in a stream is one *sui generis*. *2 Weil, Water Rights in the Western States (3rd Ed.), page 1125; Hough v. Porter, 51 Oreg. 318, 439, 98 Pac. 1083, 1109, col. 2;* and in the very recent decision by the Ninth United States Court of Appeals, *People of the State of California v. United States, 235 F. 2d 647, 663*, it was said:

> "The only proper method of adjudicating the rights on a stream, whether riparian or appropriative or mixed, is to have all owners of lands on the watershed and all appropriators who use water from the stream involved in another watershed in court at the same time."

Not only is this rule recognized by the Federal Courts, but also it is Texas state law, announced, for instance, by the El Paso Court of Civil Appeals in this manner:

> "It would be contrary to the fundamental principles of justice to enjoin the diversion and delivery of the water by the water district to these persons, thereby depriving them of its use, without their joinder in the suit, and being afforded an opportunity to assert and protect their rights. Such procedure would be contrary to the rule quoted, for they are interested in the object of the suit, and such a decree would directly affect their interests." *Wilson v. Reeves County Water Improvement District No. 1, 256 S. W. 346, 347.*

Petitioners' claim that the Act of July 10, 1952, should be liberally construed to permit this suit is contrary to what was announced in *Larson v. Domestic and Foreign Commerce Corporation, 337 U. S. 682, 703, 93 L. Ed. 1628, 1643*, as follows:

> "It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to *suits for damages*. The Congress has increasingly permitted such suits to be maintained against the sovereign, and we should give hospitable scope to that trend. *But the reasoning is not applicable to suits for specific relief.* For, it is one thing to provide a method by which a citizen may be *compensated* for a wrong done to him by the Government. *It is a far different matter to permit a court to exercise its compulsory powers to restrain the Government from acting, or to compel it to act.* There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a

whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right." (Emphasis ours.)

In the case at bar Petitioners ask for specific relief and seek by injunction to "stop the Government in its tracks" while it is undertaking to operate the Rio Grande Federal Reclamation Project through the Secretary of the Interior in whom the responsibility is placed by *Section 10 of the Reclamation Act, 32 Stat. 388, 390.*

(Appendix B.

(b) The will of a court may not be substituted for that of the Secretary of the Interior who is charged with the responsibility for the administration of the properties involved in this proceeding by that section of the statute just mentioned. *United States v. Ide, 277 Fed. 373, 382, Par. 8, aff'd. Ide v. United States, 263 U. S. 497, 68 L. Ed. 407; State of New Mexico v. Baeker, 199 F. 2d 426, 428, C. A. 10; Hudspeth County Conservation & Reclamation District No. 1 v. Robbins, 213 F. 2d 425, 432.*

In the *Ide* case (8th Circuit), the court said:

"It is well settled that the plaintiff (United States) may construct drainage works as a part of its irrigation system. * * * The necessity for drainage and the methods of conducting the work are, in our opinion, in the sound discretion of the Secretary of the Interior, and such discretion cannot be reviewed by the courts * * *.

"The right of the plaintiff to save and continue the use of the drainage, seepage, and waste waters of its project is established by the following cases: (Citing cases.)

> "The permits granted by the State of Wyoming to the defendants could not authorize the defendants to take the waters of the plaintiff, and, as Bitter creek was not a natural stream, said permits gave no authority to take water from Bitter creek. * * * The law is clear, in our opinion, that the plaintiff had the right to save and continue to use the drainage, seepage, and waste waters of its project as long as such water could be identified and had not been abandoned." *277 Fed. 382, 383.*

In the *Backer* case the plaintiff sought to restrain Reclamation officials from reducing the quantity of water in Elephant Butte Reservoir to a point which would destroy the fish in the reservoir and create a health menace to the people of Trust or Consequences, and in the Hudspeth County case the plaintiffs, who were the same plaintiffs as those in the present case, sought to do there just what they are trying to do now. In the latter case the court said:

> "Whatever may be the merits of the plaintiffs' contentions, the court would have no jurisdiction by declaratory judgment * * * or by injunction against government officers to substitute itself in any part of the management and operation of the dams, reservoirs and facilities for the agency designated by Congress." *213 F. 2d at 432.*

Section 10 of the Reclamation Act (32 Stat. 388, 390), provides: "That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect."

Respecting this section, this Court said: "Authority could hardly have been conferred in more comprehensive terms * * *." *Henkel v. United States, 237 U. S. 43, 50, 59 L. Ed. 831, 835.*

The Plaintiffs' First Amended Complaint alleges in Paragraph II, 2.3 thereof, that:

> "Most of the lands hitherto irrigated from the Rio Grande in the Elephant Butte-Fort Quitman area lie within the municipal limits of three contiguous irrigation districts: (a) Elephant Butte Irrigation District of New Mexico * * * the municipal limits of which embrace substantially all the irrigated lands in New Mexico; (b) El Paso District, the municipal limits of which embrace substantially all the irrigated lands within El Paso County, Texas; (c) Hudspeth District, the municipal limits of which embrace some 30 square miles of land in the extreme southwesterly portion of Hudspeth County, Texas * * *." (R. 58.)

and in Paragraph II, 2.4, that:

> "The Rio Grande Project is a Government reclamation project embracing Elephant Butte Dam and Reservoir and a great network of irrigation ditches and other works. * * * All the irrigation works within Elephant Butte and El Paso Districts are operated by the Bureau of Reclamation as a part of the Rio Grande Project, those two districts having similar contracts with the United States with respect to operation and maintenance of such works." (R. 58.)

One of these contracts, being that between the United States and Elephant Butte Irrigation District dated November 9, 1937, is in the record as Defendants' Exhibit No. 2 (R. 179-203). This contract made pursuant to the Reclamation Laws, including the Bureau of Reclamation

part of the Interior Department Appropriation Act, fiscal year 1938, approved August 9, 1937, *50 Stat. 564 at 593*, sets forth the manner and terms upon which the United States would deliver water from storage to those lands which composed the area within the Elephant Butte Irrigation District and also transferred to the United States, insofar as the rights of this district were concerned, the right to operate a hydro-electric plant at Elephant Butte Dam. By plaintiffs' admissions, a similar contract was made between the United States and the El Paso County Water Improvement District No. 1.

In addition, the United States made certain Warren Act contracts with Plaintiff Hudspeth County Conservation & Reclamation District No. 1, defining the water rights of plaintiffs in the use of water from the Rio Grande (Complaint VII, 7.1-7.8, R. 70-73).

Notwithstanding all of the above, the Petitioners in the present suit ask the court to substitute its will for that of the Secretary of the Interior, with respect to the disposition of drainage and seepage waters of the Rio Grande Project (Complaint IV, R. 62-66), and ask for a holding in conflict with the discretion of the Secretary of the Interior as expressed in the three separate contracts between the United States and the Elephant Butte Irrigation District and the El Paso County Water Improvement District No. 1, and the Hudspeth County Conservation & Reclamation District No. 1. This they may not do under the decisions cited above.

(2) The Plaintiffs' First Amended Complaint does not state a claim against the defendants upon which relief can be granted because:

It is an attempted class action forbidden by the law as applied to the facts, in that the Complaint seeks to maintain a class action by five Texas citizens of Hudspeth County against "adverse claimants (who) number more than one thousand, many of whom reside outside the State of Texas" (First Amended Complaint I, 1.4, R. 55), by joining eleven individual defendants, all of whom are shown by the same paragraph of the Complaint to be residents of Texas, as supposed representatives of these admittedly more than one thousand adversely interested parties, but such action cannot be supported for the reason that plaintiffs' Complaint shows on its face that if what is pleaded therein is true, these numerous individuals are in competition with each other and do not constitute a single class with a joint interest.

For instance, Complaint III, 3.2 (R. 60), alleges that for many years waters of the Rio Grande have been used for irrigation in the El Paso District and Hudspeth District within the limitations of a notice of intent to appropriate filed with the appropriate state agency, and that others using the waters largely outside the terms of such notice or permit claim appropriative rights to the continued use of such waters.

With reference to appropriative rights, the first in time is the first in right.[5] Consequently, the "more than one thousand" individual defendants have conflicting interests in competition with each other and with the eleven Texas citizens upon whom Petitioners seek to force involuntary representation not only of those who happen to be Texas citizen land owners, but also the large number of New Mexico citizen land owners.

In Paragraph III, 3.3 of the Complaint (R. 60-61), it is said that appropriative water rights can be acquired only from the state and that priority of rights depends on the effective date of the state authorization, while in Paragraph III, 3.6 (R. 61-62), it is contended that by the Rio Grande Compact the State of Texas made a waiver respecting water uses in the Rio Grande Valley "with respect to all farmers who made beneficial use of the waters of the Rio Grande above Fort Quitman prior to the effective date of the Compact, namely May 31, 1939" and that "the relative priority (as against other appropriations using water above Fort Quitman) of the water rights covered by said waiver is as of said May 31, 1939."

In addition, this Court judicially knows that New Mexico is among those states in which the common law doctrine of riparian rights is not recognized, and the right to the use of water for irrigation purposes is based solely on the doctrine of appropriation (New Mexico authorities previously

[5]The first clause of Article 7472, Revised Civil Statutes of Texas, reads: "As between appropriators, the first in time is the first in right * * *."

As to New Mexico: Albuquerque Land & Irrigation Co. v. Gutierres, 10 N. M. 177, 61 Pac. 357, 360 (1900, prior to statehood), and Article XVI, Sec. 2 of the State Constitution, has for its last sentence: "Priority of appropriation shall give the better right."

cited, *Hinderlinder v. LaPlata River & Cherry Creek Ditch Co., 304 U. S. 92, 98, 82 L. Ed. 1202*), while Texas is operating under a sort of hybrid doctrine in which riparian rights are still recognized. *Motl v. Boyd, 116 Tex. 82, 108, 286 S. W. 458, 467.*

Further, in Texas, as shown by that case, same page citation, the existence of riparian rights depends on whether the surveys abutting on the Rio Grande were patented by the State of Texas before or after the passage by the legislature of the Water Appropriation Act of 1889.

In Paragraph I, 1.4 of the First Amended Complaint, the plaintiffs allege with reference to the individual defendants named therein, that they "are sued individually and as representatives of all land owners or water users claiming adversely to Plaintiffs in rights to the use for irrigation of the waters of the Rio Grande (or the return flow therefrom) between Elephant Butte Dam and the El Paso-Hudspeth County line" (R. 56). That certainly includes all of the land owners of the Elephant Butte Irrigation District in New Mexico, and which itself holds a contract with the United States under which, among other things, it receives pecuniary benefits from the government in exchange for its release of its right to the use of the Rio Grande water for power purposes (Par. 4, R. 184), and eleven Texas citizens cannot be proper individuals to represent this municipal corporation and the numerous crowd of New Mexico citizens whose rights are sought to be curtailed by plaintiffs in this proceeding, even if plaintiffs qualified as adequate representatives of all Texas owners of land abutting on the Rio Grande, which we do not concede, because

the interest of these eleven defendants is to secure more water for Texas as against New Mexico.

Petitioners seek by this suit to establish the proposition that the rights of individual land owners to water depend solely upon priorities controlled alone by state water laws of general application. That knocks the "class" completely apart. In a proper case such a suit can be brought against several defendants as representatives of many, but in the circumstances and on the facts alleged by Petitioners herein in their Complaint, a class action cannot be maintained according to the holdings of both federal and state courts: *Christopher v. Brusselback*, 302 U. S. 500, 82 L. Ed. 388; *Ayers v. Carver*, 15 How. 591, 15 L. Ed. 179; *Hansberry v. Lee*, 311 U. S. 32, 85 L. Ed. 22; *Kentucky Home Mutual Life Ins. Co. v. Dalby*, 190 F. 2d 797, 803, C. A. 6; *Knioum v. Slattery*, 239 S. W. 2d 865, Tex. Civ. Apps., wr. ref.; *Meyer v. Wichita County Water Improvement Districts*, 265 S. W. 2d 660, 662, Tex. Civ. Apps., wr. er. ref., n.r.e.; *Olsen v. Superior Court*, 276 Pac. 2d 168, 173, Calif. D. Ct. Apps.

(3) The Elephant Butte Irrigation District, a municipal corporation of the State of New Mexico and a very numerous crowd of land owners in New Mexico, whose interests according to the plaintiffs' petition are adverse to those of plaintiffs, are indispensable parties who have not been joined.

In *Shields v. Barrow*, 17 How. 130, 139, 15 L. Ed. 158, 160, the rule was laid down that indispensable parties are:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final

> decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

Texas' highest court is also in accord with this principle, for in *Veal v. Thomason, 138 Tex. 341, 159 S. W. 2d 472, 477, Par. 7*, it is stated:

> "It has many times been held by the courts of this State that those who are necessary parties to a suit are such persons as have or claim a direct interest in the object and subject matter of the suit and whose interests will necessarily be affected by any judgment that may be rendered therein. Such persons are not only proper parties but are necessary and indispensable parties, plaintiff or defendant."

The object of the suit in the case at bar is to secure more water from the Rio Grande for farmers in Hudspeth County, Texas, and as there has not been enough water in the river to serve everybody for a number of years, this necessarily means that, if relief prayed for is granted, the land owners in New Mexico would get even less water, in accordance with their respective priorities, than they get now. It is obvious that their interests are directly and vitally affected.

Furthermore, the Petitioners seek by injunction to control the operation by the United States of the hydro-electric plant at Elephant Butte Dam in New Mexico [Amended Complaint, Par. IX. (R. 74-76), and Par. X, 10.1 and 10.3 (R. 76-77)].

But the Government's right to operate this plant is grounded, among other things, on a contract with Elephant

Butte Irrigation District of New Mexico, which came about as the result of Congressional action.

The Interior Department Appropriation Act, fiscal year 1938, under the caption "Bureau of Reclamation" *(50 Stat. 564, 593)*,[1] authorized the Secretary of the Interior to enter into a contract with El Paso County Water Improvement District No. 1 and with the Elephant Butte Irrigation District of New Mexico, by which the districts should be relieved of the construction cost of Elephant Butte Dam chargeable to development of power at that point.

Article 4 of the contract made between the United States and the Elephant Butte Irrigation District of New Mexico, dated November 9, 1937 (Defendants' Exhibit 2, R. 179), pursuant to authority of the above statute provided that the District desired to receive the benefits of the Act as consideration for the "conveyance by the District, for itself and the land owners therein, to the United States of all the right, title, interest and estate of the District and its land owners in the use of said dam and other project works, including the project water supply, for the development of hydroelectric energy." (R. 184.)

The other provisions of the contract carry this into effect, and Paragraph 12 (R. 192) provides that "Pursuant to subsection J of Section 4 of the Act of December 5, 1924 (43 Stat. 703), collections of water rental charges under the contract between the United States and the Hudspeth County Conservation & Reclamation District No. 1, dated

[1] Appendix C.

December 1, 1924 * * * will be credited to the District's obligation" in the manner set forth.

In *Green v. Brophy, 110 F. 2d 539, 541*, the Court of Appeals for the District of Columbia said:

> "* * * litigation requiring decision as to the legal consequences to be attached to a relationship where only one party to the relationship is made a party to the action is perhaps the clearest case of failure to join an indispensable party."

In addition we refer this Court to *Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 233, 83 L. Ed. 126, 142*, and *Commonwealth Trust Co. v. Smith, 266 U. S. 152, 69 L. Ed. 219.*

II.

There Is No Conflict of Decision.

In affirming the correctness of the action of the District Judge in dismissing the Plaintiff's First Amended Complaint, what the Court of Appeals held was that the pleading in question did not set forth an action "for the adjudication of rights to the use of water of a river system or other source, or for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange, or otherwise," within the meaning of the Act of July 10, 1952, *43 U. S. C. A. Sec. 666.*

We have examined all of the cases alleged by Petitioners to be in conflict with this holding. They are: *United States*

v. Aetna Casualty & Surety Co., 338 U. S. 366 (erroneously cited as *388 U. S. 338*); *United States v. Yellow Cab Co., 340 U. S. 543*; *Indian Towing Company v. United States, 350 U. S. 61*; and *People of the State of California v. United States, 235 F. 2d 647, C. A. 9*; to all of which reference is made on page 8 of the Petition, together with *Dickinson v. Burnham, 197 F. 2d 973, Petition 13*, and *Montezuma Canal Co. v. Smithville Canal Co., 218 U. S. 371, Petition 14*.

With the exception of *People of California* and *Montezuma*, all of them show such an obvious dissimilarity of subject matter, and law applied thereto, from that of the present case that comment on them seems unnecessary.

There is no conflict with *People of California v. United States, 235 F. 2d 647*. Petitioners seem to have overlooked the fact that in that case there were "some three thousand (3,000) defendants," and that "The United States brought into the trial court *all of the other claimants of the river system*, praying that its title to water right *as the land owner* at the mouth be quieted against each and all." (Emphasis supplied.) *235 F. 2d at 652*.

On these facts it may be true that the action was one for the adjudication of rights to the use of water of a river system, and, as suggested by the Court, "By final judgment, the District Court is empowered to grant complete relief as to all claimants and the United States, adjudicate the water rights, set up control systems and require physical solutions of specific problems, equitably charging the

xpense thereof to the claimant of surplus so created." *5 F. 2d at 652-653.* Why not, with everybody in court?

Neither is there any conflict with *Montezuma Canal Co. Smithville Canal Co., 218 U. S. 371.* In that case the nithville Canal Company and the Central Canal Company nd the water users under these canals sued the Monteuma and other canal companies and the water users under ose canals to determine the rights of appropriators ithin Grahain County, Arizona, *218 U. S. at 372.* Thus gain everybody concerned was in court for that trial.

Montezuma filed a cross-bill against the San Jose Comny and various other defendants, setting up as *res adjuata* a decree entered February 17, 1897, in another tion numbered 805, wherein Montezuma was plaintiff d the San Jose Company was a defendant along with hers, in which it was determined that Montezuma Canal mpany had certain rights to flow and that San Jose and ose claiming under it be enjoined from obstructing that w. *218 U. S. at 373 and 376-377.*

In the main suit the Court said:

> "The different incorporated canal companies, who are parties plaintiff and defendant herein, are * * * incorporated * * * and own and control the several canals, * * *, originally operated by unincorporated partnerships or societies and * * * are the successors to the unincorporated owners of the several canals, and are in every instance carrying the water for the use of the landowners or the successors in interest of the landowners who were the original appropriators of the water carried therein for irrigation purposes.

> * * * None of the several parties hereto who are landowners, appropriators of water, or who are receiving water for irrigation from the different incorporated companies or through the several canals owned by the parties hereto, have ever maintained their right to their several priorities as against the co-owners of land or co-users of water in their respective canals, *but the individual landowners and appropriators of water that is furnished under the management of each of the several ditches or canals, herein referred to have surrendered to their co-users in that canal their priority, and the water that is taken from the river for the use of the land under the several canals has been, by the consent of the different landowners under each canal, delivered to the different tracts of land in accordance with the extent of the interest in the ditch or canal of each landowner*, regardless of the acreage cultivated by the said landowner, and regardless of the date when said acreage was placed under cultivation." (Emphasis added.) *218 U. S. at 376.*

The question, therefore, arose in the main suit as to whether due effect was given to the decree of February 17, 1897, in the previous action, No. 505, and in holding that it was not, the court with this background of facts said as quoted at pages 14-15, Petition:

> "We premise that the Montezuma Canal Company and the defendant, individuals and canal companies in action No. 505, whether viewed as appropriators of water or as mere carriers for others, sufficiently represented the users of the waters of the respective canals to cause such water users to be bound by the judgment." *218 U. S. at 382.*

We have no criticism of that premise as applied to the facts of that case, and there is nothing in that case which militates against the holding of the Fifth Court of Appeals

in the one under consideration, wherein the plaintiff landowners insist that the Petitioner Hudspeth County Conservation and Reclamation District has no authority to bind them in their water rights which are individually determined by state authorization based on which every man has a priority depending on the date of his permit. See Plaintiffs' First Amended Complaint, R. 54, particularly Paragraph "III. First Controversy: State Authorization," R. 60, and Paragraph "VII. Fifth Controversy: Effect of Contracts," R. 70.

We respectfully submit that the real purpose of this action filed by Petitioners was not to adjudicate the rights to the use of the waters of the Rio Grande river system but to attempt to get out of a Warren Act contract which Petitioners made with the United States on December 1, 1924, as amended April 27, 1951. This seems rather obvious from the language of the Complaint in the paragraph last mentioned, for if the Petitioners got a trial on the merits they would have no case at all if that Warrent Act contract is valid. This is made even more clear by a reading of the opinion of the court in *Hudspeth County Conservation and Reclamation District No. 1 et al. v. Robbins, et al.*, 213 F. 2d 425, cer. cert. den. 348 U. S. 833.

III.

There Is No Important Question of Federal Law.

The Court below having decided simply that the Petitioners did not bring a suit against the United States of

the character concerning which sovereign immunity has been waived by the Act of July 10, 1952, the holding can be of little or no importance to anyone other than the parties to this particular suit. The Court did not in any way pass upon the validity of the Act itself, nor was it questioned by any of the parties. The law still is, as provided by the Act, that the United States may be joined in any suit for the adjudication of rights to the use of water of a river system. It is not believed that a decision of inadequacy of a plaintiff's pleading to set out the character of action authorized by statute raises a question of such importance that it, without something more, is sufficient to warrant review by this Court, particularly when the decision below is clearly correct.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition For A Writ of Certiorari filed herein should be denied.

Respectfully submitted,

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APPENDIX A

Act of July 10, 1952, 66 Stat. 560, C. 651, Title II, Sec. 208 (43 U. S. C. Sec. 666):

Sec. 208. (a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving

the right of States to the use of the water of any interstate stream.

(d) None of the funds appropriated by this title may be used in the preparation or prosecution of the suit in the United States District Court for the Southern District of California, Southern Division, by the United States of America against Fallbrook Public Utility District, a public service corporation of the State of California, and others.

APPENDIX B

Reclamation Act of June 17, 1902, 32 Stat. 388, Sections 6 and 10:

* * * * *

Sec. 6. That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act: *Provided*, That when the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

* * * * *

Sec. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

APPENDIX C

Interior Department Appropriation Act, Fiscal Year 1948, "Bureau of Reclamation"—50 Stat. 564, 593.

Rio Grande project, New Mexico-Texas: For operation and maintenance, $350,000: *Provided*, That the Secretary of the Interior is hereby authorized to enter into a contract with the El Paso County Water Improvement District Numbered 1 and the Elephant Butte Irrigation District of New Mexico by which the districts will be relieved of the obligation of making payment for the construction cost chargeable to the development of power of Elephant Butte Dam in the amount determined as equitable by the Secretary of the Interior in return for the conveyance by the said two districts to the United States of all the districts' right, title, interest, and estate in the use of said dam and other project works, including the project water supply, for the development of hydroelectric energy: *Provided further*, That in such contracts it shall be stated that the use of the dam, project works, and water supply for power purposes shall not deplete or interfere with the use thereof for irrigation purposes: *Provided further*, That the net earnings of the power plant and system belonging to the United States and any other available revenues shall be applied, until the cost thereof has been met, upon the cost of the power development, including (1) the cost of power facilities, (2) the amount invested, as herein authorized, in the cost of Elephant Butte Dam, and (3) the amount invested

by the Bureau of Reclamation in Caballo Dam: *Provided* further, That after the cost of the power development has been met the net earnings of the power plant and system shall be disposed of as Congress may direct.